



COURT RIGHTFULLY LOSES ITS TASTE FOR NATURAL-FLAVORS CONSUMER-FRAUD CLASS ACTIONS

by Joe Bierowski

In recent years, American consumers have become more conscious of eating natural foods. Because of this, food and beverage producers have stressed on their labels that their products contain natural ingredients. Such marketing has attracted not only health-conscious customers but also lawyers who specialize in fraud class actions against packaged consumer-goods companies. These lawyers target products' natural claims with lawsuits filed under state "unfair and deceptive acts and practices" (UDAP) laws, claiming that the defendants duped consumers into purchasing their product at all or paying more than what it is worth. One attorney, Spencer Sheehan of Sheehan & Associates, has made a name for himself in this litigation space by questioning food makers' use of "vanilla" in product names and on labels. His lawsuits filed in federal courts in New York haven't fare well, so it seems Mr. Sheehan has expanded his portfolio to include natural claims. Ironically, in losing two natural claims on the same day, February 7, 2023, in front of the same judge, his vanilla lawsuit losses came back to haunt him.

Background

Hawkins v. The Coca-Cola Co. challenges the labeling of a Piña Colada-flavored Fanta. The named plaintiff alleges that she purchased the soda because the can's label prominently stated that it contained "100% Natural Flavors." That claim is inaccurate, the complaint alleges, because as a chemical examination of the soda conducted by Mr. Sheehan revealed, the "Malic Acid" in the ingredient list is unnatural DL-Malic Acid. In the second lawsuit, *Hoffman v. Kraft Heinz*, Hoffman claims to have been misled by the front-of-package statement "Natural Flavor with Other Natural Flavor" on a MiO Mango Peach water enhancer. Like in *Hawkins*, a chemical analysis requested by Mr. Sheehan found that the MiO product contained DL-Malic Acid, which "fundamentally alters the original combination of [naturally occurring] L-malic acid and Sugar" and renders the water enhancer's flavor artificial. Neither the Fanta nor the MiO ingredient label list "DL-Malic Acid" as a flavoring ingredient, the complaints stress, and the presence of artificial flavoring render the "natural" flavoring claims unlawfully false or misleading under state UDAP statutes and breach consumer warranties. This blog post will focus on the UDAP claims.

Court's Reasoning

When assessing a plaintiff's deception claim under UDAP statutes, courts ask whether a reasonable consumer would be misled by the product's representations. In both *Hawkins* and

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Hoffman, the court explained that at the motion to dismiss stage, judges should not make the reasonable-consumer determination as a matter of law unless the plaintiff's claims are "patently implausible and unrealistic." Apparently, the court believed the claims in both cases met that standard, because it decided the reasonableness issue as a matter of law, concluding that neither plaintiff was reasonably misled.

For its reasonableness analysis, the court relied on decisions dismissing some of Mr. Sheehan's "vanilla cases." The court explained that these cases distinguished legal claims about "flavors" from those targeting "ingredients." In flavor cases, if the "labels in question made no representation as to any particular ingredient(s) that were contained in the product or were the source of that flavor," the consumer would not find any information that contradicts or differs from statements such as "100% Natural Flavors." Because neither the Fanta nor the MiO nutrition facts specified the flavor source, the court in *Hawkins* and *Hoffman* invoked the conclusion of one court in a vanilla case: "[w]hat is misrepresented?"

The court then turned to whether the plaintiffs offered any "factually substantiated allegations" that the product contains DL-Malic Acid or that DL-Malic Acid provided the products' flavor. In both lawsuits, the plaintiff acknowledges the products have some natural flavors, but that laboratory tests establish the Fanta and MiO each contain DL-Malic Acid, and thus that artificial substance is responsible for the products' flavor. The court refuses to accept the plaintiffs' "unsubstantiated allegations about the *possibility*" that the products contain DL-Malic Acid or the "conclusory statements" that the substance provides the products' flavors. In both opinions, the court notes that the plaintiffs offered little to no information regarding the details of these tests (i.e. the testing methodology; the date, time, or place of the testing; the testers' qualifications, etc.).

Dismissed With Prejudice

After concluding the plaintiffs could not overcome the defendants' motions to dismiss all claims against them, the court decided enough was enough. He dismissed both claims "with prejudice," meaning that Mr. Sheehan could not amend and refile either complaint. In both opinions, the court uses nearly identical language and reasoning to justify the with-prejudice dismissals. The court previously allowed Mr. Sheehan to amend his original complaint in both lawsuits, and after the revisions, the court still rejected the suits' reasoning. The conclusion of both motions put it bluntly: "a busy district court need not allow itself to be imposed upon by the presentation of theories seriatim."

Conclusion

All the signs in the *Hawkins* and *Hoffman* opinions indicate judicial fatigue with the type of claims with which Mr. Sheehan and his fellow food-labeling crusaders have flooded the nation's courts. Despite writing in both opinions that "reasonableness" is routinely a matter for juries to determine, Southern District of New York Judge Kenneth E. Karas found the claims to be so "unrealistic" that he addressed the question as a matter of law. Judge Karas also listed out Mr. Sheehan's numerous vanilla-case defeats, concluded that those decisions created a new line of cases, and then used the general principles derived from those rulings against him. Judge Karas sent a final message by dismissing with prejudice, an action we wish more judges presiding over labeling-fraud claims would take.